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BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	CS Docket No. 98-82
	)	
Review of the Commission's Cable Attribution Rules	)	

COMMENTS OF
TELE-COMMUNICATIONS, INC.

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COMMENTS OF
TELE-COMMUNICATIONS, INC.

Tele-Communications, Inc. ("TCI"), by its attorneys, hereby files its Comments in the above-captioned proceeding.[1]

I. INTRODUCTION AND SUMMARY.

The Commission's Cable Attribution Notice reflects a concern that cable ownership interests which confer the ability to "influence" are inherently inappropriate. This concern is reflected in the Commission's recent broadcast attribution Notices,[2] which included proposals to attribute, in limited

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1 Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Review of the Commission's Cable Attribution Rules, CS Docket No. 98-82, *Notice of Proposed Rulemaking*, FCC 98-112 (rel. June 26, 1998) ("Cable Attribution Notice").

2 See, e.g., Attribution of Broadcast Interests, MM Docket Nos. 94-150, 92-51, 87-154, *Notice of Proposed Rule Making*, 10 FCC Rcd. 3606, at ¶ 3, n. 8 (1995) ("For example, concerns have been raised recently that networks, while securing interests in stations that do not trigger attribution of an ownership interest, may nevertheless have used (nonvoting or otherwise nonattributable) equity investments to influence station affiliation decisions." (citing Christopher Stern, "Small

circumstances, traditionally non-attributable debt relationships and nonvoting stock interests.

In reviewing its attribution policies for cable, the Commission must keep in mind that the attribution rules are a tool to achieve a particular policy objective, not ends in themselves. Thus, it is critically important to understand the purposes underlying ownership regulation and to configure attribution criteria to meet these specific purposes.

In this regard, TCI points out that the Commission historically adopted wholesale the broadcast attribution criteria to measure attributable cable ownership interests, including the horizontal limit. In so doing, the Commission explicitly embraced the objectives underlying the broadcast rules. However, as described below, these objectives are not appropriate for the cable industry. In fact, there are fundamental differences in the cable and broadcast industries which necessitate the application of different attribution standards for the two industries. These differences, coupled with the evolution of the programming marketplace, justify significant relaxation of the cable horizontal ownership attribution standard.

TCI believes that the Commission should revise its attribution criteria for the horizontal limit to capture ownership interests which confer *de jure* control. In cases where there is potential *de*

Investments Yield Big Benefits," Broadcasting & Cable, October 17, 1994, at 26)) ("Broadcast Attribution Notice").

facto control[3] an MSO should be able to avoid attribution through self-certification that it will not control the cable company in which it has a minority investment generally, and specifically will not do so with respect to programming, personnel, budget, and technology choices. The concept of influence (as opposed to control) should not be regarded as relevant.

On balance, this approach imposes the least costs and is fully consistent with the purposes of the horizontal cap, which are designed to address perceived concerns that cable operators may exercise monopsony power to force inappropriate concessions from programmers and may vertically foreclose programmer entry, thus reducing program diversity. Moreover, relaxation of the current overly restrictive cable attribution rules is essential to permit the continuation of the pro-consumer and pro-competitive benefits of geographic clustering and localization of system management that TCI and many other cable operators are undergoing.

Although TCI focuses its Comments primarily on the need for relaxed attribution rules in the context of the horizontal cap, it believes that the attribution criteria applicable to other cable and broadcast ownership limits should be further liberalized, consistent with previous TCI attribution proposals.[4] TCI opposes

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3 A synonym for both *de jure* and *de facto* control is operational control, i.e., ownership of more than 50% of the voting stock or actual control.

4 See Comments of Tele-Communications, Inc. in MM Docket Nos. 94-150, 92-51 and 87-154 (filed Feb. 7, 1997) ("TCI 1997 Comments"); see also Comments of Tele-Communications, Inc. in MM Docket No. 92-264 (filed Feb. 9, 1993).

the application of the equity and/or debt plus proposal to either broadcast or cable interests.

As an Appendix to these Comments, TCI attaches a study conducted by Charles River Associates ("CRA") entitled "An Economic Analysis of the Effects of Partial Ownership Interests in Cable Systems" ("CRA Attribution Analysis").[5] This analysis is consistent with the proposals contained in TCI's Comments and demonstrates generally the need to relax the current broadcast attribution rules as applied to the horizontal limit.

II. THE COMMISSION'S WHOLESALE APPLICATION OF THE BROADCAST ATTRIBUTION RULES TO CABLE INTERESTS IS INAPPROPRIATE.

Historically, the Commission has applied, in wholesale fashion, the broadcast attribution rules to cable. TCI believes that this approach is no longer appropriate, particularly for the horizontal ownership limit, given key structural differences between the cable and broadcast industries and the substantial, ongoing evolution of the programming industry.

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[5] Stanley M. Besen, Daniel P. O'Brien, and John R. Woodbury, Charles River Associates Incorporated, Serge X. Moresi, Department of Economics, Georgetown University, "An Economic Analysis of the Effects of Partial Ownership Interests in Cable Systems," (Aug. 14, 1998).

A. An Examination Of The Origin Of The Broadcast Attribution Standards Reveals That Wholesale Application Of These Standards To Cable Is Inappropriate.

A review of the history of broadcast and cable attribution makes clear several points. The Commission has never conducted a thorough inquiry to determine whether there are substantial differences between the broadcast and cable industries.[6] Rather, it has simply applied its broadcast attribution rules generally to cable ownership interests. As demonstrated below, Congress granted the Commission the authority to depart from the broadcast attribution rules in the context of cable horizontal ownership. The Commission should rely upon its discretion to adopt attribution criteria which reflect the reality of the cable business and, in the case of the cable horizontal ownership limit, are more narrowly tailored to fit the underlying purpose of that limit.

The Commission's first effort to constrain multiple ownership of the media, namely broadcast facilities, began in the early 1940s.[7] The Commission adopted duopoly[8] and national multiple ownership restrictions for FM in 1940 and for television in 1941,

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[6] Cable Attribution Notice at ¶ 3 (The Commission's 1984 comprehensive rulemaking proceeding revising its cross-ownership rules "did not perform a separate analysis of the ownership structures of cable systems" because it was "'reasonably certain' that they were not sufficiently different from broadcasting to justify the adoption of a distinct benchmark").

[7] See Attribution of Ownership Interests, *Report and Order*, MM Docket No. 83-46, 97 F.C.C.2d 997, at ¶ 3 (1984) ("1984 Attribution Report and Order").

[8] The duopoly rule prohibits common ownership, operation, or control of two stations in the same broadcast services which serve substantially the same area.

and the first one-to-a-market rule in 1941.[9] Originally, these rules were governed by an attribution standard designed to capture only controlling interests in the broadcast industry. The Commission found a particular interest attributable "only where a stockholder holds a majority voting interest in the licensee or otherwise exercises actual control over the licensee."[10]

The Commission adopted attribution rules which governed interests conveying less than control in 1953, in conjunction with its adoption of the "seven station" national multiple ownership rule. The primary purpose of this ownership limitation was to "promote diversification of ownership in order to maximize diversification of program and service viewpoints as well as to prevent undue concentration of economic power contrary to the public interest."[11]

The Commission first addressed cable attribution in the 1970 *Second Report and Order* when it originally adopted the broadcast-

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9 1984 Attribution Report and Order, at ¶ 3, n.3 (referencing 5 Fed. Reg. 2384, at 2381 and n. 4 (Jun. 26, 1940) and 6 Fed. Reg. 2282, at 2284 and n. 2 (May 6, 1941)).

10 Id. at ¶ 3, n. 4.

11 Id. Notably, the Commission has found that the appropriate geographic focus for a diversity analysis is local as opposed to national. See Henry Geller, Ownership Regulatory Policies in the U.S. Telecomsector, 13 Cardozo Arts & Ent L.J. 727, 731 (1995) (in assessing whether the national duopoly restrictions should remain, the Commission noted that "'the appropriate geographic market for diversity analysis is primarily local and our local multiple ownership rules. . . are the rules which are designed to promote diversity in that geographic market.'") (citation omitted) ("Geller ownership article").

cable and network-cable cross-ownership rules (found in 76.501).[12] While neither the *Second Report and Order* nor the initial Notice considered attribution issues *per se*, the rule the Commission adopted (as found in the associated Appendix) contained notes addressing attribution. The attribution standards in these notes mirrored the broadcast attribution criteria existing at that time.

The Commission applied (and continues to apply) the same attribution criteria for broadcast and cable entities largely due to its belief that the rationales underlying the various broadcast and cable ownership rules are similar.[13] As the Commission has noted:

> [i]n the contexts of cable operator/broadcast network cross-ownership, cable national subscriber (horizontal) limits, and cable channel occupancy (vertical) limits, the attribution standards are identical to those used in broadcasting. Indeed, in drafting these cable attribution rules, we expressly adopted the broadcast model based on our view that the purpose of these cable attribution rules is similar to the purpose of the broadcast attribution rules: to identify those ownership thresholds that enable an entity to influence or control management or programming decisions (for broadcasters), or the programming marketplace (for the two cable concentration attribution rules). Further, Congress has suggested that the diversity rationale is relevant to cable. Consequently, we deemed it

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12 Amendment of the Commission Rules Relative to Community Antenna Television Systems, *Second Report and Order*, Docket No. 18397, 23 F.C.C.2d 816 (1970). Significantly, the "Commission has never provided any detailed statement of the [network-cable] rule's purposes or probable effects, beyond the assertion" it should ensure vigorous competition and provide diversity of control. Stanley M. Besen, Thomas G. Krattenmaker, A. Richard Metzger, Jr., and John R. Woodbury, Misregulating Television: Network Dominance and the FCC, at 37 (1984) ("Misregulating Television").

13 The FCC's most recent revisions to its attribution rules in the early to mid-1980s considered in tandem the then existing broadcast and cable multiple ownership rules.

appropriate to apply the broadcast attribution standards to the foregoing cable contexts.[14]

TCI believes that the Commission's view that broadcast and cable ownership issues should generally be governed by the same attribution criteria is no longer appropriate. When there are different industries, different interests being affected, and disparate objectives in creating an ownership limitation, different attribution criteria are mandated.

The Commission has recognized this fact in the past. For example, the Commission's 1985 reconsideration of its media (broadcast, cable and newspaper) multiple ownership rules flatly rejected requests that it apply the media attribution standards to telco/cable cross-ownership issues. The Commission concluded that it traditionally addressed the underlying attribution standards for these rules separately "largely because these two categories of multiple ownership rules relate at least in part to different industries, affect the interests of different parties, and have disparate underlying objectives."[15] The Commission departed from the broadcast rules and crafted attribution criteria tailored for the specific concerns presented in that context.[16] These factors justifying differential treatment are equally applicable here.

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14 See Broadcast Attribution Notice, at ¶ 27.

15 Attribution of Ownership Interests, *Memorandum Opinion and Order*, MM Docket No. 83-46, 58 R.R.2d 604, at ¶ 22 (1985) ("1985 Attribution Order").

16 See Broadcast Attribution Notice at ¶ ¶ 28-29.

The Commission considered following this approach in the 1992 Horizontal Ownership Notice.[17] After acknowledging generally the potential efficacy of the broadcast attribution rules, the Commission found that:

> [i]t should be noted, however, that these [broadcast] attribution criteria were intended to include ownership thresholds which may impart the ability either to influence or control management or programming decisions of a broadcast licensee, and consequently these criteria may not be appropriate to address the concerns at issue in this proceeding. We seek comment regarding whether these attribution criteria (or a modified version thereof) are appropriate for implementing cable subscriber limits or whether some other attribution criteria would be more suitable.[18]

The Commission ultimately decided not to tailor the attribution criteria for the horizontal limit,[19] preferring instead to adopt cable attribution criteria "not substantively different from" the broadcast attribution rules.[20] However, the Commission did not conduct an extensive analysis of the particular

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[17] Horizontal and Vertical Ownership, *Notice of Proposed Rule Making and Notice of Inquiry*, 8 FCC Rcd 210 (1992) ("1992 Horizontal Ownership Notice"). In fact, the Commission is again seeking comment "on whether any relevant differences exist between the cable and broadcasting industries that would support a distinct cable attribution standard even for those cable rules designed, like our broadcasting ownership rules, to ensure competition and diversity." Cable Attribution Notice at ¶ 13.

[18] 1992 Horizontal Ownership Notice, at ¶ 38 (emphasis added).

[19] See Horizontal and Vertical Ownership Limits, *Second Report and Order*, MM Docket No. 92-264, 8 FCC Rcd 8565 (1993) ("Horizontal Ownership Order"). The Horizontal Ownership Order notes that the effective date of the horizontal ownership rules are stayed until final judicial resolution. Id. at ¶ 3.

[20] Id. at ¶ 34, n. 48.

characteristics of the cable industry and how those characteristics impacted the goals underlying the horizontal limit.[21] Rather, the Commission cited the legislative history of the 1992 Cable Act as support for reliance upon the broadcast attribution criteria. The same legislative history also made clear that the Commission was free to adopt "other criteria the FCC may deem appropriate."[22] There is no doubt that the Commission has the authority to adopt attribution criteria tailored to the cable industry and to the horizontal ownership limit.[23] TCI believes that now is the time to do so. The above historical account makes clear that the past Commission failed to recognize the differences existing generally between the broadcast and cable industries that justify separate

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21 To the extent the Commission addressed this issue, its statements were largely conclusory. For example, the Commission characterized the underlying Notice as proposing to adopt the broadcast attribution standard because it believed that the "same attribution criteria . . . used to implement the broadcast multiple ownership rules and cable cross-ownership rules. . . have similar objectives" and therefore appear "appropriate in the context of cable subscriber limits." Id. at ¶ 30.

22 S. Rep. No. 92, 102nd Cong. 1st. Sess. 80 (1992) (emphasis added).

23 In a subsequent discussion of the horizontal ownership attribution rules, the Commission noted that, in adopting these criteria it relied upon the Senate Report language and section 11f(2) of the 1992 Cable Act which directed the Commission "to consider the significant benefits on industry concentration, including economies of scale and increased capital investment in more and better original cable programming" as dispositive. It noted that "in keeping with statutory intent", it "balanced the costs of industry consolidation with its significant benefits. As a result, these particular attribution rules set a somewhat less restrictive standards than do some of our other recently enacted cable regulations." Broadcast Attribution Notice, at ¶ 27, n. 49.

treatment. As explained below, these crucial differences, among other things, compel a different attribution standard.[24]

B. Differences Between The Broadcast And Cable Industries Warrant Less Restrictive Attribution Criteria.

The Commission's attribution rules generally seek to identify interests in or relationships to a licensee that confer on the holder a degree of influence or control such that the holder may potentially affect programming decisions or other core operating functions. The Cable Attribution Notice queries whether the Commission should emphasize interests conveying influence.[25] TCI believes that this focus is misplaced in the context of the horizontal limit.

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24 See FCC Press Release, "Wireless Telecommunications Action; Commission Affirms Key Provisions of LMDS Second Report and Order, Paving Way for Auction," Report WT 98-1, CC Docket No. 92-297 (rel. Feb. 3, 1998) (Separate Statement of Commissioner Ness) ("We should, however, carefully review our attribution rules in all our services. But I caution that a 'one size fits all' approach may not be advisable. There may be important service distinctions at the heart of differing attribution rules. There may be different expectation interests pertaining to arrangements that have been predicated on our existing rules. These considerations should be examined for their ongoing relevance.")

25 "The attribution rules seek to identify those corporate, financial, partnership, ownership and other business relationships that confer on their holders a degree of ownership or other economic interest, *or* influence or control over an entity engaged in the provision of communications services such that the holder should be subject to the Commission's regulation." Cable Attribution Notice at ¶ 1. The proposal to focus on influence seemingly violates an implicit standard of rule making associated with FCC ownership regulation, i.e., that they be clear. See Geller Ownership Article, at 728 ("The history of FCC regulation in this field [multiple and cross ownership restrictions] (and generally) is that broad, 'mushy' standards are not implemented - only firm, objective standards are successful.").

The current cable horizontal ownership attribution rules are triggered by insignificant ownership interests. Whatever the continued appropriateness of these standards for the broadcast industry, clearly they are overly restrictive in the cable ownership context. This is because there are material factual differences between the cable and broadcast industries which render equally restrictive attribution treatment inapposite. One size does not fit all.

Cable systems, unlike broadcast licensees, do not generally compete with each other in the same geographic areas for subscribers, local advertising revenues, or for programming.[26] Thus, the analysis of ownership concentration, competition, collusion and program diversity is different for cable than for broadcasting.[27]

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[26] See CRA Attribution Analysis at 17-18; Office of Plans and Policy, Federal Communications Commission, FCC Policy On Cable Ownership: A Staff Report by Kenneth Gordon, Jonathan D. Levy and Robert S. Preece, at 86 (Nov. 1981) ("cable systems, including MSO's, do not compete with each other at the local level. In local markets, ownership by an MSO is not directly relevant.") (emphasis in original) (citation omitted); id. at 93 (In the context of a discussion of multiple ownership of cable systems, the Report notes that "[o]nly in markets where MSO's [sic] compete directly with one another could problems of horizontal market power arise. Thus it is clear at the outset that such [market power] problems cannot arise in the local distribution function of cable, since different systems do not compete directly against one another.") (citations omitted). See also Stanley M. Besen, Steven R. Brenner, and John R. Woodbury, Charles River Associates Incorporated, "An Economic Analysis of the FCC's Proposed Cable Ownership Restrictions," at 11, n.7 (Feb. 9, 1993), an Attachment to the Comments of Tele-Communications, Inc. in MM Docket No. 92-264 (Feb. 9, 1993) ("1993 CRA Analysis").

[27] As a result of the lack of competition within the same market, one cable system's market power in selling either to subscribers or advertisers within any given geographic market will not likely be enhanced if the cable system acquires or is

Because broadcasters compete in the same geographic market, the Commission has designed attribution rules to ensure only limited economic overlap -- that competitors are separately owned and that licensees are competing for viewership and programming, among other things. The key concerns underlying these broadcast attribution rules are competition and diversity.[28] By contrast, there is in most instances no direct competition at the local level between cable operators. Thus, to the extent that the broadcast attribution rules are motivated by the desire to prevent anti-competitive and collusive practices within the local market (as are the broadcast local ownership restrictions), this reasoning does not apply to the cable horizontal limit.

The Commission also has imposed national restrictions on broadcast network ownership and other practices in an effort to promote diversity and prevent undue concentration of economic power.[29] That is, broadcast networks have some ability to govern

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acquired by another system serving a different geographic area. Nor is there a potential for increased collusive behavior when concentration increases, because cable systems are not direct competitors.

28 See Misregulating Television, supra at 23-29 (Describing the goals of competition, diversity and localism. The Communications Act relies upon competitive forces to principally determine how the broadcasting business is organized and conducted. Marketplace forces should determine the number, quality, content and cost of programs to the extent possible. The goal of diversity is to increase the number and types of programs produced by the different suppliers and then broadcast to viewers by different entities. There is no single method of achieving diversity. The most appropriate method is to increase the number of outlets, or viewing options.)

29 1984 Attribution Report and Order, at n. 4.

the flow of discourse nationally and may hamper the independence of local broadcasters to the detriment of diverse local viewpoints. These concerns, though, are functions of the single-channel technology and limited number of available channels that have prevailed in the broadcasting industry.[30] Moreover, broadcast programming is funded by advertising revenue. This creates incentives to "cater to the masses," exhibiting programming designed to attract the largest possible audiences.[31]

But in cable, the concern over diversity is less apparent. Because cable operators have an increased number of channels, the array of programming provided is far larger than broadcasting because additional outlets are available to satisfy consumer demand. There is less concern with program diversity, that is, the industry convention increasingly permits subscribers -- not the cable MSOs -- to choose among varying packages and tiers of programs. Unlike broadcast viewers, cable subscribers are able to signify intensity of preference through explicit purchases. Cable

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30 The nature of the broadcast medium is seen as pervasive. To illustrate, in the Pacifica decision, the Court limited the broadcast of indecent programming, finding "the broadcast media have established a uniquely pervasive presence in the lives of all Americans . . . material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." Pacifica Foundation v. F.C.C., 438 U.S. 726, 748 (1978).

31 See Misregulating Television, at 22 ("If programs are financed by advertising revenue, with no explicit charge to viewers. . . the amount charged for the programs will reflect the number of people who watch, not the value they place on the program"); id. at 25 ("In the television industry, competition cannot produce strict economic efficiency because of the intractable problems of pricing this public good").

programming is funded, among other things, with subscriber fees. This permits cable subscribers to express some preference for various types of programming through their subscription (or lack thereof).

In addition, there are a number of specific behavioral restrictions applicable to the cable industry that are designed to ensure the carriage of diverse programming. These include, for example, the must carry, channel occupancy, and leased access rules, which are specifically tailored to encourage diversity within cable systems and address possible anti-competitive effects.[32]

In sum, these key industry differences function to reduce the need for restrictive cable attribution criteria and support the reformation of the cable attribution criteria as applied to the cable horizontal limit.

C. Changed Marketplace Conditions Warrant Less Restrictive Attribution Criteria.

In response to the "significant changes in the video marketplace and the broadcasting business, including greatly increased competition and the past economic downturn in the [broadcast] industry," the Commission has instituted proceedings in recent years "to reexamine the assumptions upon which the attribution rules and cross-interest policy rest and to determine whether they continue to serve the public interest."[33] Generally,

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[32] See TCI's Horizontal Limit Comments at Section II.A.2.

[33] Broadcast Attribution Notice, at ¶ 9.

the marketplace has evolved drastically since the initial adoption and 1984 revision of the current broadcast attribution criteria. This evolution compels wholesale re-examination of attribution thresholds in all segments of the video marketplace.

There are simply more programming outlets available today than in 1984 when the big three networks dominated the video business.[34] Several additional broadcast networks, including Fox, UPN, and the WB Network have emerged. There are more TV stations on the air.

In addition, as detailed in TCI's Horizontal Limit Comments, independent programming has flourished; for example, the number of national satellite services has increased significantly in the last three years and the percentage of vertically integrated cable programmers has declined.[35] Moreover, numerous alternative competitors to cable have emerged. Significantly, DBS now has over 7 million subscribers -- it had none in 1984 -- and more than 12 million homes obtain their video programming from non-cable MVPDs. Moreover, both the broadcasting and cable industries are rapidly deploying digital video technologies which should increase

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[34] See Misregulating Television, at 178-179 (Commission action in the 1970s to foster cable, subscription TV, MDS and DBS, along with VCRs will ultimately remove the rationale for network regulation. As these types of "technologies and industries mature, they will provide bases for the establishment of networks that can challenge the dominance of ABC, CBS, and NBC. Moreover, their very existence will undermine whatever surface plausibility surrounds existing regulations.") Given the significant development of these factors, and their impact on the need for continued broadcast network regulation, they directly affect whether the horizontal limit should remain.

[35] See TCI's Horizontal Limit Comments at Section III.B.1.

significantly overall programming capacity.[36] Digital technology carries the prospect of overcoming the remaining UHF handicap and potentially providing many more over-the-air stations through multiplexing of SDTV.[37] These changed circumstances reduce the chance that any cable operator, let alone an entity with a non-controlling interest in a cable operator, could materially restrict diversity or harm competition. This, in turn, justifies a relaxation of the attribution rules generally, and in particular the attribution rules applied to the cable horizontal limit.[38]

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In summary, changed circumstances, coupled with an examination into the fundamental objectives of the horizontal ownership limit, as well as the significant differences between the broadcast and cable industries, all support significant relaxation of the attribution criteria for the horizontal limit. In particular, as detailed more fully in Section III.C., these factors dispel any need to focus on the potential to influence.

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[36] This is in addition to upgrades many cable operators have already implemented.

[37] TCI's Horizontal Limits Comments at Section II.A.3.

[38] Similar circumstances were enough for the Commission to repeal in whole its radio network rules. See Misregulating Television, at 43-44 (to illustrate, while in 1941 there were fewer than 1000 stations, by 1977 over 8000 radio stations were on the air). A similar result, in the form of relaxed attribution criteria, is appropriate here.

III. THE COMMISSION SHOULD TIE THE APPLICATION OF ITS ATTRIBUTION CRITERIA FOR THE HORIZONTAL CAP TO OPERATIONAL CONTROL.

A. Under An Operational Control Attribution Standard, Only *De Jure* Ownership Interests Should Be Automatically Attributed.

The Commission should adopt an attribution standard for cable horizontal ownership based on operational control. This means that interests conveying *de jure* control are automatically attributed,[39] while partial interests,[40] including non-voting stock or limited partnership interests would be considered nonattributable regardless of the percentage held.

Regarding questions of *de facto* control, including general partnership interests, there should be no attribution for interests less than 10 percent generally.[41] For those interests greater than 10 percent but less than 50 percent, a cable MSO should be permitted to certify that it will not control the cable company in which it has a minority investment generally, and specifically will not do so with respect to programming, personnel, budgets, and technology choices.[42] Such action should ensure the integrity of

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39 The Commission should exempt attribution of a cable system's subscribers to an MSO where there is a clear indication through a contractual agreement that such MSO will have no operational control.

40 All "partial" interests are by definition less than controlling and therefore convey, in the Commission's view, the potential to influence the decisions of the controlling cable operator. Thus, the terms "partial" and "potentially influential" interests are used interchangeably.

41 Passive interests should be permitted to hold up to 49.9 percent prior to a finding of attribution.

42 Such a certification is consistent with stated Commission concerns regarding *de facto* control yet obviates the need for

the Commission's processes, while offering an efficient mechanism[43] for compliance.[44]

Influential, as opposed to controlling interests, would not be regarded as relevant so long as the minority-investor MSO has made the relevant certification.[45] This approach reflects the appropriate conclusion that issues of influence are less relevant in this instance.

B. The Commission Should Rely On An MSO Certification Process To Ensure That Minority-Interest Owners Do Not Control The Cable System.

TCI is cognizant that a "*de jure* control" attribution threshold will permit ownership interests which allow cable MSOs to

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a costly case-by-case determination. See Broadcast Attribution Notice, at ¶ 4 ("We have determined who has 'de facto' control of a licensee on a case-by-case basis, looking generally for this purpose to determine who has ultimate control over a licensee's programming, financial and personnel policies.").

43 A certification process would obviate the need to speculate whether less than controlling interests would create the possibility for *de facto* control. See Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap: Amendment of the Commission's Cellular/PCS Cross-Ownership Rule, WT Docket No. 96-59 and GN Docket No. 90-314, *Report and Order*, 11 FCC Rcd. 7824, at ¶ 118 (1996) (speculating that "a 20 percent interest held by a single entity would create a possibility of *de facto* control") ("CMRS Spectrum Cap Order").

44 A self-certification approach moves the Commission away from mechanistic regulation of conduct and toward the type of enforcement orientation that Commissioner Powell has posited would produce better results. See Speech by Michael K. Powell, New Regulatory Thinking (April 6, 1998) <http://www.fcc.gov/Speeches/Powell/spmkp807.html> (as prepared for delivery) ("Another way that we can make regulation more efficient is to shift our resources from prospective regulation to enforcement").

45 See Cable Attribution Notice at ¶ 12.

exert influence. As detailed below, there are serious problems associated with attribution thresholds that block inappropriate influence yet still promote beneficial ownership interests. Similarly, the case-by-case resolutions that would be necessary under an influence standard would impose significant administrative and regulatory burdens. In light of this situation, TCI believes that a minority-interest holder MSO certification process is an appropriate solution.

1. The Commission Has Relied Upon A Self-Certification Process As An Efficient Regulatory Alternative In A Variety Of Related Circumstances.

The Commission currently employs a self-certification process in a variety of circumstances. The examples discussed below demonstrate the Commission's continued dependence upon the certification/disclaimer process as the most efficient, least costly means to ensure compliance with its rules without resorting to overbroad restrictions or time-consuming case-by-case determinations.

One of the most important tasks for which the Commission is responsible, preventing interference with the radio spectrum, relies essentially on an honor system for compliance. The Commission requires a certification that Part 15 unlicensed devices radiating energy do not cause unacceptable interference.[46] Considering the core interest at stake, use of a certification

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[46] The Commission certifies equipment as compliant with Part 15 based on representations and test data submitted by the applicant. See 47 C.F.R. § 2.907; 47 C.F.R. § 2.1033 (detailing information to be submitted to Commission by applicant).

process in this case illustrates the efficacy of this type of regulation.

The Commission also relies heavily upon the certification process in its licensing functions.[47] For applications awarded through competitive bidding, an applicant is required to certify, among other things, that it is legally, technically, financially and otherwise qualified pursuant to the Communications Act of 1934, as amended, ("Act") (including the statutory foreign ownership limits), and that it will not engage in collusive practices during the bidding process.[48] Certification is useful generally because it is less time-consuming for the Commission and permits the Commission to concentrate on enforcement.

Regarding ownership interest issues,[49] when the Commission adopted a 3 percent broadcast attribution benchmark for mutual funds, investment companies, banks, and trusts in 1968, it adopted a certification/disclaimer policy obligation. This requirement obligated passive investors to file disclaimers of intent to control the management policies of portfolio companies that owned interests in broadcast stations for those companies that did not

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47 See, e.g., 47 C.F.R. § 1.65 (requirement to keep applicant information accurate on an ongoing basis); 47 C.F.R. § 73.3513(d) (by signing broadcast application, applicant certifies as to truthfulness of its submission, with penalties including fine, imprisonment and license revocation); 47 C.F.R. § 1.743(d) (common carrier certification regarding applications).

48 47 C.F.R. § 1.2105(a)(2)(v) - (x).

49 These examples are lifted from the broadcast experience, and therefore are concerned with influence as well as control. TCI demonstrates in these Comments why the Commission should not be preoccupied with interests conveying influence.

already include disclaimers in their prospectuses. Any company not filing the required disclaimer would be subject to the then standard one percent limit on ownership interests.[50]

While the Commission eventually removed the disclaimer requirement for passive investors,[51] in 1984, it adopted a related obligation that all licensees certify that passive investors have not "exerted or attempted to exert any influence or control over any of the affairs of the licensee. With inclusion of this certification provision, . . . [the Commission found] it unnecessary to require disclaimers of control by passive investors themselves, as ha[d] been required in the past."[52]

The Commission has relied upon certifications and disclaimers in other similar circumstances.[53] For example, the Commission has

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50 Multiple Ownership of AM, FM, and TV Broadcast Stations, *Report & Order,* 13 F.C.C.2d 357 (1968).

51 This occurred in 1976, when the FCC increased the limit on passive ownership interests to 5 percent. In addition to increasing the ownership limit, the FCC adopted a proviso in notes four and five of the television multiple ownership rules and note three of the cable television cross ownership rule. The proviso expressly stated that banks, insurance companies, and investment companies could only increase their ownership limit to 5% "provided they 'exercise no control over the management or policies of the corporation' invested in." See Multiple Ownership of AM, FM, TV Broadcast Stations, *Report & Order*, 59 F.C.C.2d 970, at ¶ 20 (1976). The FCC concluded that the proviso "will work as well as the disclaimer did and will involve less paper work for media corporations, institutional investors and the Commission." Id. at ¶ 21. This proviso was subsequently removed in the 1984 Attribution Order.

52 Id. at ¶ 34.

53 See Storer Communications, Inc., *Memorandum Opinion & Order,* 101 F.C.C.2d 434, at ¶ 37 (1985), aff'd, 763 F.2d 436 (D.C. Cir. 1985) (in addressing a claim that the minority shareholders would reduce the amount of children's television